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IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. 339

HERMAN R. SLAKMAN,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

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## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

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Herman R. Slakman, petitioner, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second District, State of Florida, entered in Case No. 68-289, on February 7, 1969.

### Citations to Opinions Below

The judgment and sentence of the Criminal Court of Record of Polk County, Florida, entered June 19, 1968, (App. 1) is unreported. The opinion and judgment of the District Court of Appeal, Second District, State of Florida, (App. 2) is reported at 222 So.2d 221. The order of that Court denying rehearing (App. 3) is unreported. The order

of the Supreme Court of Florida granting petitioner's timely petition for writ of certiorari to the District Court of Appeal, Second District (App. 3), is unreported. The judgment of the Supreme Court of Florida, discharging the writ of certiorari as improvidently issued (App. 4), is also as yet unreported, as is the order of the Florida Supreme Court denying petitioner's petition for rehearing (App. 4).

## Jurisdiction

The judgment of the District Court of Appeal, Second District, State of Florida, a court of final appellate jurisdiction in Florida, *Callender* v. *Florida*, 380 U.S. 519, 383 U.S. 270, was entered on February 7, 1969. Petitioner's timely petition for rehearing was denied March 7, 1969. Petitioner's timely application to the Supreme Court of Florida for writ of certiorari was initially granted (App. 3) but was then discharged on April 8, 1970 (App. 4). Petitioner's timely petition for rehearing in the Supreme Court of Florida was denied June 8, 1970 (App. 4). This Court's jurisdiction is invoked under Title 28, U.S.C., Section 1257(3).

## Question Presented

Whether in petitioner's trial and conviction for arson, in allegedly procuring the burning of his store, petitioner's Fourteenth Amendment due process rights were vitiated by a courtroom identification by the confessed arsonist, who claimed to have met the "owner" briefly in the dark store but who initially described the "owner" in a way not resembling petitioner and to whom State investigators subsequently displayed petitioner's photograph to prepare the witness for the courtroom identification.

## Constitutional Provisions Involved

This case involves an asserted right, privilege or immunity secured to petitioner by the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part," . . . nor shall any State deprive any person of . . . liberty . . . without due process of law . . . "

## Statement of the Case

Petitioner Slakman, charged with having engaged co-defendants Bedami, Hernandez and Posey to burn the building occupied by petitioner's department store on June 30, 1966, was convicted in the Criminal Court of Record of Polk County, Florida, on the courtroom identification of two witnesses. Lawrence Posey, who long prior to petitioner's trial in March 1968 pleaded guilty to arson (Tr. 8),* testified that a person whom Posey never saw before or since the night of the fire admitted Posey and Hernandez to the store so that they might burn it, which he said they did (Tr. 23-47). At petitioner's trial Posey pointed out petitioner as the man who Posey claimed had admitted him to the store (Tr. 30). The other witness was Clark Stone, an apparently disinterested person who testified at petitioner's trial that, from a distance of 75 feet, he momentarily observed a man whom he identified as petitioner "come out the front door of his department store" at sometime after six-thirty in the evening (Tr. 49).

The courtroom identification of petitioner by the witnesses Posey and Stone evidently overcame, in the jury's delibera-

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*Agreeably to amended Rules 21 and 23 of the Rules of this Court (eff. July 1, 1970), petitioner has elected to file for initial perusal an abbreviated transcript of a portion of the certified record now lodged in the Supreme Court of Florida. References here are to that transcript.

tions, the substantial showing made by the defense that petitioner was elsewhere during a period embracing the times Posey and Stone testified they saw petitioner at the department store. [The testimony of these defense witnesses is excluded from the abbreviated transcript filed initially with this petition, but its general tenor and import is described by argument at Tr. 69-72.]

Long prior to petitioner's trial, Posey gave sworn and unsworn statements describing the person he said he met in the department store in a way completely inconsistent with petitioner's appearance (Tr. 16, 42, 43, 44). Later, after the investigation was complete and petitioner had been charged and was waiting trial, an investigator for the State displayed "a couple of photographs," including one of petitioner, to Posey and inquired of Posey, "which one was it and which one was Mr. Slakman" (Tr. 46).

After petitioner was found guilty by the jury but before he was adjudged guilty and sentenced, Posey recanted* under oath his courtroom identification of Slakman, saying that he had never seen Slakman before the trial and that his courtroom identification was predicated entirely on investigator Savage's display of petitioner's photograph in the company of Tampa police (Tr. 88, et seq.).

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*Posey's post-trial recantation was relied on in the State courts as an independent basis for a new trial. Though the transcript of his recantation was placed of record before the trial judge before he pronounced judgment and sentence, the Florida appellate court held that it was "not properly in the record-on-appeal now before us" (App. 2). The recantation is not referred to in this petition as an independent basis for exercising this Court's jurisdiction but rather for the limited purpose of showing the totality of the circumstances surrounding the courtroom identification.

The witness Stone, who testified positively at the trial that "I saw him come out the front door of his store" and that "it was Mr. Slakman" (Tr. 49, 50), admitted on cross-examination that the front door could not be seen from Stone's position and that he was unable to say, from his momentary glimpse of the individual in question, which way he was facing or "which way he went, . . . up, down, or anywhere-- he disappeared" (Tr. 52). Following the trial, Stone reconsidered his positive identification and the fleeting observation on which it was based, and gave a sworn statement to petitioner's attorneys retracting his identification testimony. Stone explained that he had assumed the person in question to be Slakman because Stone had first assumed that the person had come out the front door of Slakman's store (Tr. 67). Stone testified before the trial judge, in connection with petitioner's motion for new trial, that he, Stone, could not "in good conscience" adhere to the testimony he had given at petitioner's trial (Tr. 78-79).

The federal question here asserted was repeatedly raised in the courts below. When Posey was asked on direct examination to make his courtroom identification of petitioner, defense counsel objected generally that "it is not a fair identification in these circumstances," in which Posey was bound to identify petitioner by a process of eliminating known counsel (Tr. 30-31). Defense counsel did not then know that Posey had been shown petitioner's photograph prior to the trial. That fact was revealed during the State's redirect examination (Tr. 45) and it was further explored on recross. (Tr. 45-46). The next day defense counsel moved the trial court to strike from the evidence Posey's "testimony . . . with respect to purported identification of the defendant here in the courtroom as the person who admitted Mr. Posey and Mr. Hernandez into the store on the night of June 30, 1966"

on the grounds that Posey's prior description of the person in question was

> "so inconsistent with the appearance of the defendant as not to form any rational or reasonable basis for an identification in the courtroom"
>
> Tr. 53,

and on the ground that the courtroom identification was tainted by the highly suggestive pretrial photographic display (Tr. 54). Defense counsel explicitly asserted petitioner's constitutionally-protected right to due process of law and, in argument not contained in the abbreviated transcript here initially filed, relied on this Court's decisions in *United States* v. *Wade*, 388 U.S. 218, *Stovall* v. *Denno*, 388 U.S. 293 and *Gilbert* v. *California*, 388 U.S. 263. The trial court denied the motion to strike, holding that the "'sufficiency or insufficiency of testimony regarding identity of the defendant is one which properly would go to the jury" and that the motion to strike should have been made following the testimony of the witness, rather than on the following day after the State rested (Tr. 54).

Petitioner's motion for new trial asserted that the courtroom identification, under the circumstances, deprived petitioner of due process of law, secured to him by the United States Constitution (Tr. 58). That motion was denied (Tr. 80-81). Petitioner's assignments of error preserved the question (ground 33, Tr. 94) and the point was thoroughly brief and argued to the District Court of Appeal, Second District. Following the adverse decision of the District Court of Appeal, in which the point was not mentioned in the opinion (App. 2), petitioner asserted as one of the principal points in his petition to the Florida Supreme Court:

> "In an unnecessarily suggestive and proper manner,

Posey was shown 'a couple' of photographs by an investigator for the State shortly before petitioner's trial and was asked, 'Which one was it and which one was Mr. Slakman?,' in order to secure a courtroom identification of petitioner notwithstanding Posey's prior descriptions of his purported accomplice in a way inconsistent with petitioner's appearance [thereby depriving petitioner of a fair trial: *citing Wade, Stovall and Simmons*]."

**Reasons for Granting the Writ**

The three Florida courts, including particularly the District Court of Appeal, Second District, have decided a substantial federal question in a way not in accord with this Court's decisions in *United States* v. *Wade;* 388 U.S. 218, *Gilbert* v. *California,* 388 U.S. 263, *Stovall* v. *Denno,* 388 U.S. 293 and *Simmons* v. *United States,* 390 U.S. 377, which hold that an unfairly suggestive pretrial identification procedure, producing a courtroom identification not demonstrably predicated on an independent source, vitiates constitutionally protected rights in respect to due process of law.

Here the pretrial photographic display was conducted for no reason other than the preparation of the witness Posey for the courtroom identification at petitioner's trial. The display was highly suggestive. Investigator Savage displayed "a couple" of photographs to Posey and inquired "which one was it and which one was Mr. Slakman" (Tr. 46), thereby suggesting that the person in question was depicted in one or the other of the "couple" of photographs and that the person whose identification was desired was "Mr. Slakman." Investigator Savage testified in his pretrial deposition (again, before the display was conducted) that Posey never used the

name "Slakman" until he learned it from Savage (Tr. 17). Posey's susceptibility to Savage's wishes derived from the fact that Savage, identified as a Deputy Fire Marshall (Tr. 5), also investigated the fire in behalf of Slakman's insurance company, which through Savage paid Posey substantial amounts of money for his cooperation (Tr. 20-21).

Posey's courtroom identification could not have been based on a source of knowledge other than the photographic display unless, of course, it is assumed that Slakman *was* the person who admitted Posey and Hernandez into the store to accomplish the burning.

The very substantial doubt as to this possible source of identification knowledge is raised by the following circumstances: before inspecting petitioner's photograph, Posey identified the person in question as being "pretty fair complexioned" (Tr. 42) [petitioner's complexion was described at trial as "sallow" (Tr. 56)]; as not wearing glasses (Tr. 42) [whereas trial testimony showed that for "15 years or more" petitioner had worn glasses and "can't see beans" without them (Tr. 56-57)]; as appearing to be about 40 years of age (Tr. 16) [the investigator Savage, on careful observation, described petitioner as appearing to be about 50 to 55 (Tr. 19)]; as being "kind of full in the face. He wasn't slim" (Tr. 43) and, on another occasion, as "thin" (Tr. 16); as having eyebrows that "wasn't too dark and wasn't too heavy" (Tr. 43) [even Posey admitted at the trial that petitioner's eyebrows were in fact "pretty dark" (Tr. 43)]; and as wearing "a brown suit coat and brown pants" (Tr. 16, 44) [although it was shown at trial that petitioner "owns nothing in brown" and "has never worn brown" (Tr. 56)].

Posey's interest in accommodating Savage and the prosecutors with a courtroom identification of petitioner is shown

also by trial court's disposition of Posey's own case. While Posey denied at petitioner trial, in front of the trial judge and the prosecutor, that any one had "made any arrangements or deals with you for leniency to get that plea of guilty" from him (Tr. 37), the record of Posey's sentencing after petitioner's conviction discloses the following colloquy:

> "THE COURT: And at that time [Posey's arraignment on June 9, 1967] I think the record probably will show that no promises were made to you; but I would feel sure, not being there myself, that what was said was such as to indicate the Court would be lenient with you.
>
> "MR. POSEY: Yes, sir.
>
> "THE COURT: I don't know. And Mr. Posey was thereupon released on his own recognizance, apparently with no definite promises or commitments, but interpreting what had been said to the effect that the Court could be expected to be lenient.
>
> "Thereafter Mr. Posey did appear and testify in the two trials, one wherein Mr. Slakman was tried and one trial wherein Mr. Bedami and Mr. Hernandez were tried [which resulted in a mistrial upon the failure of the jury to agree on a verdict]."
>
> Tr. 100-101.

Posey, the confessed arsonist, was placed on probation. (Tr. 100). Hernandez was subsequently acquitted. Bedami was never retried.

## Conclusion

Petitioner's conviction resulted from a pretrial photographic identification process that was highly suggestive, unnecessary for any purpose other than to prepare the witness for the courtroom identification, and wholly unjustified by the witness' prior description of the person in question. The courtroom identification deprived petitioner of his constitutionally-secured right to due process of law.

The writ of certiorari should be granted.

Respectfully submitted,

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July 1, 1970

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# APPENDIX

## JUDGMENT AND SENTENCE OF THE CRIMINAL COURT OF RECORD OF POLK COUNTY, FLORIDA

**(entered June 19, 1968)**

You, HERMAN R. SLACKMAN, being now before the court, attended by your attorneys Chester Bedell, and Robert Smith, and the Jury having rendered a verdict of guilty on March 8, A. D. 1968, of the offense of ARSON, and pursuant to a Motion for Judgment of Acquittal and Motion For New Trial having been denied on April 23, A. D. 1968, and pursuant to an Extraordinary Motion For New Trial having been denied on May 16th A.D. 1968. THEREFORE, the court adjudges that you are guilty of said offense for which you stand convicted by decision of the jury, and sentences you to be confined in the State Prison of Florida, at hard labor for a term of not less than Three (3) years, and not more than Five (5) years.

WHEREUPON, it is further Ordered by the Court that a Supersedeas Bond be set in this cause in the amount of $2,500.00.

DONE AND ORDERED in open court at Bartow, Florida, this the 19th day of June, 1968.

/s/ Thomas M. Langston
Judge

## JUDGMENT OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

**(entered February 7, 1969, reported at 222 So.2d 221)**

PER CURIAM.

Appellant appeals from a judgment and sentence of the lower court in which he was found guilty of the crime of arson.

Appellant's main argument on appeal is that the evidence as to his identity is so unsatisfactory and inconsistent with established facts as to require an acquittal or at least a new trial. We have carefully reviewed the record-on-appeal and conclude that there is competent substantial evidence which accords with logic and reason contained therein to support the jury's finding of appellant's guilt.

The other points raised on appeal have been carefully considered and found to be without merit.

Much of appellant's brief is directed to an alleged recantation by a witness of his testimony. This is not properly in the record-on-appeal now before us. Nothing herein shall preclude the appellant from filing such petition as he may deem appropriate in the trial court.

Affirmed.

LILES, C.J., and HOBSON and MANN, JJ., CONCUR.

## ORDER OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA, ON APPELLANT SLAKMAN'S PETITION FOR REHEARING

**(entered March 7, 1969)**

The attorneys for Appellant have filed in this cause a Petition for Rehearing and, upon consideration, it is

ORDERED that the said Petition be and the same is hereby denied. It is further

ORDERED that the issuance of the Mandate in this cause be stayed for a period of fifteen (15) days from the date of this order.

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## ORDER OF SUPREME COURT OF FLORIDA GRANTING WRIT OF CERTIORARI TO REVIEW DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

**(entered June 20, 1969)**

The Petition herein for a Writ of Certiorari to the District Court of Appeal, Second District of Florida, is granted.

It is further ordered that said cause be set down for oral argument at 9:30 o'clock A.M., Thursday, November 6, 1969 with not exceeding thirty minutes to the side.

The time for filing briefs on the merits is set forth in Rule 4.5 c (6), F.A.R.

## JUDGMENT OF SUPREME COURT OF FLORIDA DISCHARGING WRIT OF CERTIORARI

**(entered April 8, 1970)**

PER CURIAM.

Writ of certiorari having heretofore issued, argument having been heard, and the court having examined the record and briefs, it appears that the writ was improvidently issued. Accordingly, the writ of certiorari heretofore issued in this cause is discharged.

It is so ordered.

ERVIN, C.J., ROBERTS, THORNAL, and CARLTON, JJ., and CREWS, Circuit Judge, concur

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## ORDER OF SUPREME COURT OF FLORIDA ON PETITIONER SLAKMAN'S PETITION

**(entered June 8, 1970)**

On consideration of the Petition for Rehearing filed by Attorneys for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

## ORDER OF SUPREME COURT OF FLORIDA GRANTING STAY OF PROCEEDINGS TO AND INCLUDING JULY 10, 1970

**(entered June 8, 1970)**

Petitioner's motion for stay is granted and proceedings in this Court, the District Court of Appeal, Second District, and in the Criminal Court of Record of Polk County, Florida, are hereby stayed to and including July 10, 1970, to enable petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court.